

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Brisben Development, Inc., Brisben Timber Lake Inc. and Timber Lake Apartments Limited Partnership and Ohio and Vicinity Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America and International Brotherhood of Electrical Workers, Local 38 and United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO and Bricklayers and Allied Craftworkers, Local No. 5

Brisben Development, Inc. and Plumbers and Steamfitters, Local 42 and Painters District Council No. 6 of Northern Ohio and Operative Plasterers and Cement Masons, Local 404 and Plumbers and Pipefitters, Local 495 a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (AFL-CIO). Cases 8-CA-33018-1, 8-CA-33042-1, 8-CA-33043-1, 8-CA-33044-1, 8-CA-33078-1, 8-CA-33078-2, 8-CA-33078-3, and 8-CA-33129-1

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The General Counsel seeks a partial default judgment in this case on the ground that the Respondents Brisben Development, Inc. (Brisben) and Brisben Timber Lake, Inc. (Brisben TL) have failed to file an answer to the consolidated complaint and compliance specification.¹ Upon charges and amended charges filed by Ohio and Vicinity Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Carpenters), in Case 8-CA-33018-1; International Brotherhood of Electrical Workers, Local 38 (Electrical Workers), in Case 8-CA-33042-1; United Union of Roofers, Water-

¹ The General Counsel's motion states that summary judgment is not sought against Respondent Timber Lake Apartments Limited Partnership (Timber Lake) because Timber Lake filed an answer. On October 5, 2004, Respondent Timber Lake filed a motion to construe the General Counsel's motion as a motion for partial default judgment. On October 21, 2004, the General Counsel filed a response to Timber Lake's motion, agreeing that the motion should be considered a motion for partial default judgment. Accordingly, we grant Respondent Timber Lake's motion to the extent that it requests that we construe the General Counsel's motion as a motion for partial default judgment.

However, we do not grant Respondent Timber Lake's motion insofar as it seeks to have the Board refrain from issuing findings of fact and conclusions of law. The findings of fact and conclusions of law that are issued herein will not prejudice Respondent Timber Lake, and we do not pass on whether it is liable for any unfair labor practices that Respondent Brisben or Respondent Brisben TL may have committed. See, e.g., *Metro Detroit Valet Parking, Inc.*, 334 NLRB No. 71 (2001) (not published in Board Volume); *B/E Aerospace*, 323 NLRB 604 fn. 3 (1997).

proofers and Allied Workers, AFL-CIO (Roofers), in Case 8-CA-33043-1; Bricklayers and Allied Craftworkers, Local No. 5 (Bricklayers), in Case 8-CA-33044-1; Plumbers and Steamfitters, Local 42 (Plumbers), in Case 8-CA-33078-1; Painters District Council No. 6 of Northern Ohio (Painters), in Case 8-CA-33078-2; Operative Plasterers and Cement Masons, Local 404 (Plasterers), in Case 8-CA-33078-3; and Plumbers and Pipefitters, Local 495 a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (AFL-CIO) (Pipefitters), in Case 8-CA-33129-1, against Respondent Brisben, Respondent Brisben TL, and Respondent Timber Lake, the General Counsel issued the consolidated complaint and compliance specification on March 30, 2004, alleging that they have violated Section 8(a)(1) of the Act. Respondents Brisben and Brisben TL failed to file an answer.

On September 21, 2004, the General Counsel filed a Motion for Partial Summary Judgment and Brief in Support with the Board. On September 24, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Respondents Brisben and Brisben TL filed no response. The allegations in the motion against Brisben and Brisben TL are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless an answer was filed within 21 days, all the allegations in the consolidated complaint and compliance specification could be considered admitted.²

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment to the extent set forth below.

On the entire record, the Board makes the following

² Copies of the consolidated complaint and compliance specification were served on both Respondent Brisben and Respondent Brisben TL by certified mail, return receipt requested. However, although Brisben TL was served at the address of its statutory agent, the consolidated complaint and compliance specification mailed to it was returned to the Region as undeliverable. The Region then followed the statutory procedure for perfecting service when an agent cannot be located. On June 22, 2004, the Secretary of State of Ohio issued a Proof of Service verifying that the service obligation had been fulfilled under Section 1701.07 of the Ohio Revised Code. Thereafter, a legal representative for Respondents Brisben and Brisben TL advised the Region that these parties would not file answers to the consolidated complaint and compliance specification.

FINDINGS OF FACT

I. JURISDICTION

At all material times Respondent Brisben Development, Inc., an Ohio corporation with an office and place of business in Cincinnati, Ohio, was engaged in the construction industry as a general contractor. Prior to 2003, Respondent Brisben, in conducting its business operations described above, annually performed services valued in excess of \$50,000 in states other than the State of Ohio. We find that Respondent Brisben has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Carpenters, Electrical Workers, Roofers, Bricklayers, Plumbers, Painters, Plasterers, and Pipefitters have been labor organizations within the meaning of Section 2(5) of the Act.

As to Respondent Brisben TL, there is no allegation in the consolidated complaint or compliance specification that it is an employer engaged in commerce within the meaning of Section 2(2), 2(6), or 2(7) of the Act, nor are there any commerce facts relating as to it. Accordingly, for purposes of this proceeding, we are unable to find that Brisben TL is a statutory employer. And, absent that finding, we cannot find that it violated the Act, as alleged.³

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent Brisben entered into a contract to construct the Timber Lake apartments. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the designated Respondents within the meaning of Section 2(11) of the Act and agents of Respondent Brisben within the meaning of Section 2(13) of the Act:

William O. Brisben	President—Brisben
Robert Schuler	Vice President—Brisben
Paul Metzger	Project manager—Brisben
John Biggs	Project Super.—Brisben
Gordon Gomez	Superintendent—Brisben

³ Accordingly, the General Counsel's motion is denied as to Respondent Brisben TL, and this matter is remanded to the Regional Director for further appropriate action.

Nothing herein will require a hearing if, in the event of an appropriate amendment to the complaint, Respondent Brisben TL again fails to answer, thereby admitting evidence that would permit the Board to find the alleged violation. In that event, the General Counsel may renew the motion for default judgment with respect to the amended complaint allegations. See, e.g., *VMI Cabinets and Millwork*, 340 NLRB No. 142, slip op. at 3 fn. 2 (2003) (default judgment denied as to allegation that respondent failed to bargain over decision to close business, but no hearing would be required if General Counsel amended complaint, and respondent again failed to file answer, thereby admitting allegations); *Cray Construction Group LLC*, 341 NLRB No. 123 (2004) (renewed motion for default judgment granted after General Counsel amended complaint to specify the "certain funds" to which the respondent failed to make contractually required contributions, and respondents again failed to file an answer).

Since about December 18, 2001, Respondent Brisben, by its attorney, Jack Fuchs, filed and maintained a lawsuit and complaint in the Federal District Court for the Southern District of Ohio (Case C-2-01-1048) against the Carpenters, the Electrical Workers, the Bricklayers, the Plumbers, the Painters, the Plasterers, the Roofers, and the Pipefitters, seeking damages, court costs, and legal expenses.

On about February 15, 2002, the lawsuit against the Roofers was withdrawn by the Respondent.

On September 26, 2002, United States District Judge Graham granted the Carpenters', Electrical Workers', Bricklayers', Plumbers', Painters', Plasterers' and Pipefitters' Motions to Dismiss the lawsuit described above. On July 8, 2003, the lawsuit was concluded when the United States Court of Appeals for the Sixth Circuit dismissed the Respondent's appeal of Judge Graham's decision.

The lawsuit described above was without a reasonable basis and motivated by an intent to retaliate against the Carpenters, Electrical Workers, Roofers, Bricklayers, Plumbers, Painters, Plasterers, and Pipefitters because of their protected concerted activity.

CONCLUSION OF LAW

By the acts and conduct described above, Respondent Brisben has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Brisben has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent Brisben violated Section 8(a)(1) by unlawfully initiating and maintaining a state court lawsuit which was without a reasonable basis and was motivated by an intent to retaliate against the protected concerted activity of the Carpenters, Electrical Workers, Roofers, Bricklayers, Plumbers, Painters, Plasterers, and Pipefitters, we shall order Respondent Brisben to pay to the Unions the amounts listed below as reimbursement for legal fees and other expenses they incurred in defending and challenging these legal proceedings, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as set forth in the compliance specification.

The attorney's fees expended by the Carpenters totaled \$38,760.50. The attorney's fees expended by the Electrical Workers, Roofers, and Bricklayers totaled \$49,290. The attorney's fees expended by the Plumbers, Painters, and Plasterers totaled \$25,906. The attorney's fees expended by the Pipefitters totaled \$12,108.

ORDER

The National Labor Relations Board orders that the Respondent, Brisben Development, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing legal proceedings against a union that lack a reasonable basis in fact and law and are instituted and prosecuted in order to retaliate against the union for the union's protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to the Unions the amounts listed below, plus interest as set forth in the remedy section of this decision, as reimbursement for the legal fees and other expenses they incurred defending the Respondent's lawsuit filed against them in the U.S. District Court for the Southern District of Ohio, on about December 18, 2001.

UNION NAME	ATTORNEY'S FEES OWED
Carpenters	\$38,760.50
Electrical Workers, Roofers and Brick- layers	49,290.00
Plumbers, Painters, and Plasterers	25,906.00
Pipefitters	12,108.00
TOTAL	\$126,064.50

(b) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2001.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on
your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT file legal proceedings against a union that lack a reasonable basis in fact and law and are instituted and prosecuted in order to retaliate against the union for the union's protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL pay to the Unions the amounts listed below, plus interest, as reimbursement for the legal fees and other expenses they incurred defending our lawsuit filed against them in the U.S. District Court for the Southern District of Ohio, on or about December 18, 2001.

UNION NAME	ATTORNEY'S FEES OWED		
		and Plasterers	
		Pipefitters	12,108.00
Carpenters	\$38,760.50	TOTAL	\$126,064.50
Electrical Workers, Roofers and Brick- layers	49,290.00		
Plumbers, Painters,	25,906.00	BRISBEN DEVELOPMENT, INC.	